IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

LILJESTRAND V. DELL ENTERS.

ADAM LILJESTRAND, APPELLANT AND CROSS-APPELLEE,
V.
DELL ENTERPRISES, INC., DOING BUSINESS AS THE DUNDEE DELL,
APPELLEE AND CROSS-APPELLANT.

Filed August 21, 2012. No. A-11-925.

Appeal from the Workers' Compensation Court. Affirmed.

Ronald E. Frank and Harry A. Hoch III, of Sodoro, Daly & Sodoro, P.C., for appellant.

Thomas M. Locher, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., and, on brief, Michelle D. Epstein for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

Adam Liljestrand appeals and Dell Enterprises, Inc., doing business as The Dundee Dell (The Dell), cross-appeals from the order of the Workers' Compensation Court review panel remanding the matter to the Workers' Compensation Court trial judge. We uphold the order of remand.

FACTUAL AND PROCEDURAL BACKGROUND

Liljestrand was employed by The Dell on September 5, 2001, when he suffered an injury to his back arising out of and in the course of his employment. The parties so stipulated and also stipulated to a substantial number of other issues and matters surrounding this workers' compensation claim. The contested issue is the nature and extent of Liljestrand's permanent disability, which issue was tried on February 14, 2011.

Liljestrand underwent bilateral L4-5 laminotomies and discectomies, as well as a thecal sac decompression, on October 25, 2001, by Dr. Charles Taylon. The parties stipulated that Liljestrand is entitled to future medical care as is reasonable and necessary to treat his injury; that

on the date of the accident and injury, he was employed at an average weekly wage of $910.05; and that there were no unpaid medical or hospital expenses, nor any that were contested. The parties agreed to the periods of temporary total disability, as well as the fact that Liljestrand had engaged in vocational rehabilitation from August 26, 2002, through and including May 7, 2004, and again from June 7, 2004, through and including September 7, 2004.

The medical evidence was that Taylon performed bilateral L4-5 discectomies on Liljestrand on October 25, 2001. Taylon opined that Liljestrand reached maximum medical improvement on February 7, 2002, and assigned him a permanent 30-pound lifting restriction, a no repetitive bending or twisting restriction, and a restriction for alternating sitting and standing every 2 hours.

The parties agreed to the appointment of Ronald Schmidt, a vocational rehabilitation consultant, for the purpose of performing a loss of earning power evaluation, as well as to provide vocational rehabilitation services. That evaluation was done in September 2002 and concluded that Liljestrand had lost 60 to 65 percent of his earning power as a result of the injury of September 5, 2001. Schmidt found that a vocational rehabilitation program was necessary and proposed that Liljestrand participate in formal retraining by attending college to obtain a bachelor of science degree with the goal of becoming a financial advisor. Liljestrand completed the program and obtained the degree. He apparently had previous college credits, because his degree program was approximately 2 years.

There was a second vocational rehabilitation plan of 90 days of job placement, and eventually, Liljestrand secured a job as an independent contractor providing financial advice and assistance involving insurance and mutual funds to clients. He was expected to develop a client base. Because of the extensive narcotic pain medication that Liljestrand was taking, he felt unable to adequately and properly perform this work because the medication made him groggy and sleepy. In 2007, Liljestrand began working for a company, but he quit that job in May 2008 because of not feeling sharp enough mentally and feeling too groggy and cloudy to carry out the required responsibilities. Liljestrand testified that without the medication, he has intolerable pain, and that as a result, his choices were to take the medication with its side effects or to be constantly in severe pain. Since quitting his company job, he has stayed at home caring for his young children. Liljestrand's wife, a nurse, testified that she calls or texts him nearly hourly to ensure that all is well, given the side effects of the medication. Liljestrand's oldest daughter was born in 2006, and his youngest daughter was 18 months old at the time of trial. He testified that he routinely prepares meals for the children, that he lifts the youngest child into her high chair and onto the changing table several times a day, and that he drives his oldest daughter to preschool 5 days a week.

Liljestrand returned to Taylon in May 2009, at which time Taylon said he was suffering from "mechanical low back pain" and referred him to a pain clinic. Taylon again evaluated Liljestrand on June 17, 2010; he felt that Liljestrand's condition had not changed since the 2009 visit and that the restrictions he assigned Liljestrand in 2002 had not changed.

Also in evidence was the medical evaluation of Liljestrand by Dr. D.M. Gammel. Gammel opined that Liljestrand injured his lower back on September 5, 2001, and that "scar tissue as a result of the surgery and further disc herniation led to the ongoing and increasing complaints that he currently suffers from." Gammel also offered the opinion that Liljestrand's

condition had deteriorated from and after Schmidt's 2002 loss of earning capacity evaluation. Gammel concluded that Liljestrand is "permanently and totally disabled at the present time" and had work restrictions of "sedentary work with lifting no greater than 10 pounds, sitting and standing as needed and no bending and squatting."

Schmidt performed an updated loss of earning capacity analysis, and his report of January 21, 2011, was in evidence. Schmidt had met with Liljestrand and reviewed the updated medical records. Schmidt opined that if Taylon's restrictions were accepted, Liljestrand had lost 35 percent of his earning power as a result of the injury, but if Gammel's opinion were accepted, Liljestrand had lost 50 percent of his earning capacity. That said, Schmidt opined that it was not possible to provide a meaningful assessment of postinjury earning capacity based on Gammel's opinion because that report provided for "no bending or squatting," and such limitation needed to be clarified given that one has to bend and squat to move from standing to sitting or vice versa. In Schmidt's report, he concluded that Liljestrand was capable of performing a number of occupations consistent with his education, background, and functional limitations, such as insurance sales agent, financial sales representative, mortgage loan interviewer, bank customer service representative, and dispatcher.

Liljestrand introduced a "rebuttal loss of earning capacity report" authored by Steven Schill. This report said that Liljestrand is "not employable" and that he is permanently and totally disabled.

TRIAL JUDGE'S DECISION

The trial judge rendered his decision on March 18, 2011, in which he found:

> Once the cause of a disability has been established, the compensation court may consider the testimony of a claimant in determining the extent of the claimant's disability. Luehring v. Tibbs Construction Co., 235 Neb. 883, 457 N.W.2d 815 (1990). The Court is here persuaded that [Liljestrand's] present levels of pain medication [oxycodone, MS Contin, Skelaxin, gabapentin, Pristiq, and Aleve], which the Court finds necessary to control the pain [he] suffers as a result of his back injury, diminish his mental acuity and make him sleepy to the extent that, coupled with the restrictions otherwise expressed by . . . Gammel, [Liljestrand] has lost all earning power.

The trial judge further found that as of October 5, 2010, Liljestrand's partial loss of earning power became complete, and that he has been permanently and totally disabled since that date, once again entitling him to weekly compensation at the rate of $508 per week.

With respect to the evidence from the vocational rehabilitation consultants, the trial judge noted Schmidt's assessment of September 2002 of 60- to 65-percent loss of earning capacity. The trial judge then said: "It is the finding of the Court that [Liljestrand] suffered a 65 percent permanent loss of earning power as a result of his accident and injury of September 5, 2001, until recently, when that earning power loss increased." The trial judge did not mention the report or opinion of the rebuttal vocational rehabilitation specialist, Schill, offered by Liljestrand, nor did the trial judge discuss or otherwise take note of the rebuttable presumption of correctness of the opinion of a mutually agreed-upon vocational rehabilitation counselor that is provided for in Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010), that would apply, unless rebutted, to the opinions of Schmidt. The Dell filed a timely application for review of this decision.

DECISION OF REVIEW PANEL

On review, The Dell claimed that the trial judge had erred in failing to accord Schmidt's report the statutory presumption of correctness, in finding Liljestrand to be permanently and totally disabled, and in failing to provide a reasoned decision. The review panel discussed the fact that Schmidt was the agreed-upon vocational rehabilitation counselor whose opinions were entitled to the statutory presumption of correctness and that he authored two opinions which were in evidence. However, the review panel found that it simply could not tell whether the trial judge had "considered the 2011 opinion of the appointed counselor or not" and that a "remand for that purpose [was] necessary." Liljestrand timely perfected his appeal to this court from the decision of the review panel.

ASSIGNMENTS OF ERROR

Liljestrand simply asserts that the "Review Panel erred when it entered its Order of Remand on Review dated September 22, 2011." The Dell asserts a cross-appeal in the event we find that we have jurisdiction, although The Dell contends we lack jurisdiction. The cross-appeal claims that the trial court should have accorded the presumption of correctness to Schmidt's opinions; that the finding of total disability was premised on the effects of Liljestrand's medication, but no expert testimony was offered regarding the effects of the medication on Liljestrand's ability to function; and that Liljestrand failed to prove that any particular dosage of his medicine was reasonable and necessary as a result of his work injury.

JURISDICTION

The Dell points out that the review panel only remanded, but did not reverse or affirm, and that thus, it contends the review panel's decision is not a final, appealable decision. However, the review panel's decision is clear that the defect it found was the failure of the trial court to discuss the statutory presumption of correctness, citing to our decision in *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 623 N.W.2d 714 (2001), *reversed on other grounds* 262 Neb. 800, 635 N.W.2d 439. In *Rodriguez*, we found, noting that the trial judge did not discuss the presumption of correctness, that we could not "tell if the trial judge ignored the statutory presumption or concluded that it had been rebutted." 10 Neb. App. at 8, 623 N.W.2d at 718-19. Accordingly, in *Rodriguez*, we "affirm[ed] the review panel's order remanding the ca[u]se to the trial court for reconsideration under the statutes and for an opinion which complies with rule 11 of the Workers' Compensation Court." 10 Neb. App. at 9, 623 N.W.2d at 719. In *Rodriguez*, the review panel said, "'We believe the standard to require at a minimum a discussion by [the trial judge] setting forth his rational[e] for rejecting the [counselor's] opinion'. . . ." *Id.* at 5, 623 N.W.2d at 717. Thus, the *Rodriguez* review panel remanded the cause for further consideration by the trial judge. Both the review panel and our decision in *Rodriguez* had their underpinning in the 1998 version of Workers' Comp. Ct. R. of Proc. 11 (Rule 11), in effect at that time, which provided:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and

how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

However, since the *Rodriguez* decision, Rule 11 has been amended effective August 31, 2011, and such rule now provides, insofar as is pertinent for this case, that "[d]ecisions of the [compensation] court shall provide the basis for a meaningful appellate review. The judge shall specify the evidence upon which the judge relies." It is, thus, this amended version of Rule 11 which is applicable here.

Some years ago, at the inception of the review panel procedure, we considered the issue of whether a reversal and remand by a Workers' Compensation Court review panel was a final, appealable order. In *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994), we found that such an order was an appealable order. In *Pearson*, we found that such an order was made in a special proceeding and affected a substantial right, because the review panel's remand "destroyed the dismissal [the employer] had obtained from the trial judge, which obviously was to its advantage." 2 Neb. App. at 705, 513 N.W.2d at 363. See *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993) (order affecting substantial right made during special proceeding is final, appealable order).

In the present case, there is a small, but not insoluble, problem, in that the review panel did not expressly reverse, in whole or in part, the decision of the trial judge as is customary when a case is remanded to a lower tribunal. We think it goes without saying that a remand to a lower tribunal of necessity cancels out all or part of the lower tribunal's original decision. The rule is clear that the meaning of a workers' compensation award, and by extension a decision of the review panel, is determined by the words used within the four corners of the award or decree. See *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986). See, also, *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990).

In this case, when the review panel's decision is read in its entirety, it is clear that the intent was a remand for determination of the applicability of the presumption of correctness to Schmidt's opinion, or whether such had been overcome by rebutting evidence from Schill. Here, the review panel cites to our *Rodriguez* decision, describing the present case as a "similar" circumstance. See *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 623 N.W.2d 714 (2001), *reversed on other grounds* 262 Neb. 800, 635 N.W.2d 439. The review panel also quoted our finding in *Rodriguez* that we could not tell "if the trial judge ignored the statutory presumption or concluded that it had been rebutted." 10 Neb. App. at 8, 623 N.W.2d at 718-19. We also said in *Rodriguez* that we "read the review panel's opinion as correctly concluding that it could not make a meaningful review without a trial judge's opinion which dealt with the statutory presumption provided in § 48-162.01(3)." 10 Neb. App. at 9, 623 N.W.2d at 719.

Therefore, given the review panel's reliance on our *Rodriguez* decision, it is clear that the effect of the remand, of necessity, is to take away the award of permanent total disability from Liljestrand. Without this appeal, there would be further proceedings by the trial judge to determine the extent of permanent disability. The trial judge is directed to determine the applicability of the statutory presumption concerning the agreed-upon vocational rehabilitation counselor's second opinion rendered January 21, 2011--necessarily meaning that the trial judge must decide the case anew after the consideration of the issue and evidence which was not discussed in the trial judge's original decision. Accordingly, Liljestrand's substantial right is

affected, as he has now lost his permanent and total disability award. Therefore, the decision of the review panel is a final, appealable order and we have jurisdiction.

STANDARD OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Supp. 2011), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

ANALYSIS

We believe that the foregoing discussion of jurisdiction does "double duty" in that it provides the basic framework by which to resolve the appeal and the cross-appeal. This case, while having an evidentiary record of some complexity, boils down to whether Liljestrand's loss of earning capacity, a degree of which he undisputedly suffered from his work injury, renders him permanently and totally disabled, or whether some lesser degree of disability exists. While the record contains extensive medical records and opinions, as one would expect given that his injury is fast approaching having occurred 11 years ago, we focus primarily on the reports and opinions of the mutually agreed-upon vocational rehabilitation expert, Schmidt, and those of the rebuttal vocational specialist, Schill.

In Schmidt's "Loss of Earning Capacity Evaluation" of September 9, 2002, Schmidt stated that Liljestrand had a 77-percent loss of "employment opportunity" of suitable jobs in the Omaha, Nebraska, labor market. Schmidt noted that Liljestrand was earning $910.05 per week when injured and that his "post injury employment options revealed an average mean weekly base salary of $398.86," which he said represented a 56-percent loss in his ability to earn wages. Schmidt's final conclusion was that "[c]onsidering all of the factors outlined in this report, including . . . Liljestrand's education, work history, transferable skills and fundamental limitations, he has lost between 60% and 65% of his earning power as it relates to the injury he sustained on September 5, 2001." Schmidt authored an updated loss of earning capacity report, dated January 21, 2011, concerning Liljestrand, which report was after Liljestrand's rebuttal vocational expert had weighed in with his opinions. Schmidt wrote that based on history, education, limitations, and "solely . . . Taylon's opinion, Liljestrand had lost 35% of his earning power as a result of his injury of September 5, 2001[, but based] solely on the restrictions that are useable from . . . Gammel's opinion, he has lost 50%" from such injury. Schmidt then argues that Schill's evaluation is "irrelevant" and flawed in that it does not provide alternative opinions based on Taylon's and Gammel's medical assessments.

Turning to Schill, he first authored a "Rebuttal Loss of Earning Capacity" report dated November 17, 2010, that addressed Schmidt's initial evaluation of September 9, 2002, that we detailed above. In this report, Schill agreed with Schmidt's evaluation done some 8 years earlier.

However, Schill cited a number of factors, including Liljestrand's own opinion that his disability had increased, that there are "numerous medical records documenting deterioration of his condition," and that Gammel was of the opinion that Liljestrand was "fully and permanently disabled at this time." Thus, Schill was of the opinion in November 2010 that Liljestrand's condition had deteriorated and that he was 100 percent disabled. Schill then authored a letter as rebuttal to Schmidt's evaluation of January 21, 2011. Schill asserts that Schmidt's reduction in his opinion of Liljestrand's loss of earning power is "baffl[ing] in light of the medical opinions, particularly [baffling is] Schmidt's opinion of only a 50% loss of earning power, based on . . . Gammel's assessment when . . . Gammel states that he is permanently and totally disabled."

We could provide much more detail about the competing and conflicting evidence provided by Schmidt and Schill regarding the extent of Liljestrand's disability. However, doing so would serve little purpose because under our standard of review, we do not decide issues of fact where there is conflicting evidence. Suffice it to say that although there was clearly evidence provided by Schill to rebut Schmidt's disability determination, the trial judge did not discuss the conflicting opinions and then set forth his factual findings and rationale for rejecting Schmidt's opinion that Liljestrand's disability was less than total. We believe, as did the review panel, that the trial judge was required by our decision in *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 623 N.W.2d 714 (2001), *reversed on other grounds* 262 Neb. 800, 635 N.W.2d 439, as well as by Rule 11, as amended, to include that analysis in his decision. In that end, we cannot tell whether the trial judge applied the statutory presumption of correctness accorded to the opinion of a mutually agreed-upon vocational rehabilitation counselor, i.e., Schmidt, nor did he find that Schmidt's opinion had been rebutted and thus was not entitled to the presumption provided for in § 48-162.01(3).

Admittedly, we could infer that the trial judge concluded that Schmidt's opinion had been rebutted by virtue of the ultimate result reached, but, summarized, Rule 11 requires the trial judge to make specific findings of fact, and while the amended Rule 11 no longer specifically requires a "rationale," the rule implicitly requires such when it is needed as the basis for "meaningful appellate review." In this case, we need factual findings and a rationale concerning whether the presumption of correctness applied or had been rebutted as did the review panel, as it so found. This was not done. Our jurisprudence is that in such circumstance, the remedy is to remand to the trial judge for a determination of the unresolved issue, upon the previous record. See *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998) (finding that failure of trial judge to clearly determine issue precluded meaningful appellate review, thus case remanded to trial judge for proper order), and *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996) (remand for new decision by trial judge on evidence adduced when judge did not follow Rule 11). We note in passing that in *Hale, supra*, the Supreme Court vacated the trial judge's decision on the issue where there was no compliance with Rule 11. This result serves to reinforce our conclusion in our jurisdiction discussion that the review panel's decision in the instant case affects Liljestrand's substantial rights and that thus, the review panel's decision is appealable.

However, we are not unaware of the fact that the trial judge is unavailable (by reason of retirement) to render the new decision required by the review panel, and our affirmance thereof. Thus, we leave the determination of who shall become the trial judge and follow the directions of the review panel in the hands of the chief judge of the compensation court.

The cross-appeal filed by The Dell is quickly disposed of because all of the asserted assignments of error either ask us to make findings of controverted fact, are subsumed in the directions on remand from the review panel, or cannot be meaningfully addressed before the remand has occurred. Therefore, we discuss the cross-appeal no further.

CONCLUSION

For the foregoing reasons, we affirm the order of the Workers' Compensation Court review panel remanding the case to a Workers' Compensation Court trial judge.

AFFIRMED.